

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOHN BARRAGAN)	
Claimant)	
VS.)	
)	Docket No. 233,731
HUTCHINSON SALT COMPANY, INC.)	
Respondent)	
AND)	
)	
AMERICAN HOME ASSURANCE CO.)	
Insurance Carrier)	

ORDER

Both claimant and respondent appeal the Review and Modification Award of Administrative Law Judge Bruce E. Moore dated June 13, 2003. The Appeals Board heard oral argument on December 2, 2003.

APPEARANCES

Claimant appeared by his attorney, Brian D. Pistotnik of Wichita Kansas. Respondent and its insurance carrier appeared by their attorney, James M. McVay of Great Bend, Kansas.

RECORD AND STIPULATIONS

The Appeals Board considered the record and adopts the stipulations contained in the Review and Modification Award of the Administrative Law Judge.

ISSUES

- (1) What is the nature and extent of claimant's injury?
- (2) Did claimant suffer a new injury arising out of and in the course of his employment with respondent or are claimant's ongoing problems a

reasonable and natural consequence of his original injury suffered through March 27, 1998?

- (3) Did the Administrative Law Judge err in computing the award?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant began working for respondent in 1994, operating as a forklift driver. In 1997, he became a scoop loader operator. Claimant suffered an accidental injury through a series of microtraumas culminating on March 27, 1998. Claimant's work involved driving both large and small scoop loaders and occasionally shoveling. The driving of the scoop loaders over rough surfaces aggravated claimant's low back, resulting in a 5 percent whole body functional impairment Award from the Administrative Law Judge. That Award was affirmed by the Kansas Workers Compensation Appeals Board (Board) in its February 28, 2002 Order.¹

Claimant filed an Application for Review and Modification on May 13, 2002, arguing that claimant's condition had worsened through a series of accidents culminating on January 10, 2002, when claimant lost his job as the result of an economic layoff. Additional members of claimant's work force were laid off with him at that time, although some were returned to work with respondent during a call-back on January 31, 2002. Claimant was not returned to work by respondent at that time as he was medically restricted from driving the large scoop loader and, according to respondent's representative Max Liby (vice president of manufacturing), claimant needed to be able to return to full activities, including driving both scoop loaders, in order to have been recalled. Claimant's prohibition from driving the large scoop loader is what prevented claimant from being recalled to work.

Claimant received medical treatment for his low back. He was ultimately referred to Sergio Delgado, M.D., board certified orthopedic surgeon, at the request of the Administrative Law Judge for a court-ordered independent medical examination on July 31, 2002. Dr. Delgado found claimant's symptoms to be not significantly different from the prior injury, although he noted claimant's complaints were substantially greater. The medical testimony from Dr. Delgado is somewhat in conflict, as he stated both that claimant suffered a worsening of his condition as a result of his ongoing job duties and also that claimant's progressive disease in his low back was a natural consequence of claimant's ongoing disease process. Claimant, however, testified that the ongoing driving activities associated with driving both the small and large scoop loaders and the occasional

¹ *Barragan v. Hutchinson Salt Company, Inc.*, No. 233,731, 2002 WL 433106 (Kan. WCAB Feb. 28, 2002).

shoveling activity made his condition substantially worse, with the pain increasing significantly.

Claimant was also referred to C. Reiff Brown, M.D., a board certified orthopedic surgeon, at the request of his attorney on April 10, 2002. Dr. Brown had previously seen claimant on September 13, 2000, for an IME. Dr. Brown's opinions were not much more helpful than were Dr. Delgado's. Dr. Brown testified that he did not believe claimant had sustained additional injury from an objective standpoint. Yet, at the same time, he testified that claimant's degenerative disc disease and ongoing arthritis had progressed. One segment of Dr. Brown's testimony the Board finds particularly significant. During a line of questioning regarding whether claimant's present condition was a natural progression of his original injury or was, instead, a new or an additional injury, Dr. Brown was asked the following questions and provided the following answers:

- Q. And, in fact, the tasks that he describes as his job even after '98 were violative of the restrictions that you placed upon him in your first examination in September of 2000, correct?
- A. Yes. I thought he was working beyond those restrictions.
- Q. And so, therefore, he would continue to have repetitive use injuries from those same tasks.
- A. He probably would.²

Dr. Brown also noted that x-rays taken in March of 1998, when compared to x-rays taken in December 2001, showed a degenerative process in claimant's back. Dr. Brown did testify that if claimant was working beyond his restrictions from March of 1998 to April of 2002, he would expect that would aggravate and accelerate claimant's degenerative disc disease. Again, in response to a question, Dr. Brown discussed the permanency associated with the new series of accidents as follows:

- Q. And so in this particular situation what we have to go on is the fact that he does have objective changes on x-rays that show an increase in his degenerative disc disease and a consistent higher level of pain. Based upon those two things isn't it your opinion that he would have permanently aggravated and/or accelerated the degenerative disc disease in his back?
- A. Well, I think that is the most likely situation.³

² Brown Depo. at 23, lines 10-20.

³ Brown Depo. at 30, lines 11-21.

The parties acknowledged at oral argument that claimant had filed additional claims against respondent for the injuries alleged through January 10, 2002. Those docketed claims, however, were not consolidated with this case and are not before the Board. The significant dispute in this matter involves whether claimant's original injury through March 27, 1998, resulted in additional worsening of his symptoms as a natural consequence of that injury or whether he suffered a new series of accidents through January 10, 2002. The Board finds that claimant's current injuries resulted from a new series of accidents that developed as a result of the job duties claimant was performing for respondent, which violated his restrictions.

The Board, therefore, finds that for the accidental injury through March 27, 1998, claimant is limited to his 5 percent whole body functional impairment pursuant to the original Award of July 11, 2001, affirmed by the Board in its decision of February 28, 2002. The Review and Modification Award of the Administrative Law Judge is, therefore, reversed to limit claimant to a 5 percent whole body functional impairment for the accidental injuries through March 27, 1998.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Review and Modification Award of Administrative Law Judge Bruce E. Moore dated June 13, 2003, should be, and is hereby, reversed, and claimant is limited to the original 5 percent whole body functional impairment for the injuries suffered to his low back through a series of accidents culminating on March 27, 1998. As the entire award has been paid in full, there is no additional compensation to be granted at this time for these injuries.

Claimant is, however, entitled to further medical treatment upon proper application to and approval by the Director.

Additionally, claimant is entitled to any unauthorized medical expense up to the statutory maximum upon presentation of an itemized statement verifying same.

IT IS SO ORDERED.

Dated this ____ day of December 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

We would affirm Judge Moore's detailed findings and conclusions.

BOARD MEMBER

BOARD MEMBER

c: Brian D. Pistotnik, Attorney for Claimant
James M. McVay, Attorney for Respondent
Bruce E. Moore, Administrative Law Judge
Anne Haught, Acting Workers Compensation Director